No. 77-1630

In the Supreme Court of the United States

OCTOBER TERM, 1978

MACK TRUCKS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 21-22) is noted in a table at 573 F. 2d 1302. The decision and order of the National Labor Relations Board (Pet. App. 23-56) are reported at 230 NLRB No. 163.

JURISDICTION

The judgment order of the court of appeals (Pet. App. 21-22) was entered on March 27, 1978. The

petition for a writ of certiorari was filed on May 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that employee Hill's unfair labor practice charge was filed within the six-month limitations period imposed by Section 10(b) of the National Labor Relations Act.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging employee Hill because of his protected concerted activities.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 8(a). It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> Sec. 10. * * *
>
> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, * * *: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *.

STATEMENT

A. The Board's Findings of Fact

David E. Hill was a salesman for Mack Trucks, Inc. ("the Company") for 17 years, the last four at the O'Hare Branch near Chicago, Illinois (Pet. App. 27). His immediate supervisor, Branch Manager M. E. Myers, rated him "as probably one of the top five [Company salesmen] in the United States," and from 1969 through 1974, Hill was selected for membership in the Company's Bulldog Club, an organization of top salesmen (Pet. App. 37; A. 278a, 221a-222a).[1]

The employment conditions for the Company's truck salesmen were established by individually-signed, standard one-year agreements (Pet. App. 28). In November 1974, the Company announced that in 1975 a new sales representative agreement would take effect. Under the new agreement, the salesmen were to receive fewer economic benefits than under the existing contract (Pet. App. 29).

Hill led the salesmen's protest against the Company's new sales representative agreement—first on

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[1] "A." references are to the appendix in the court of appeals. A copy has been lodged with this Court.

behalf of the Chicago area salesmen, then as representative of the Central Region,[2] and finally as national coordinator of the salesmen's effort to add incentive provisions (Pet. App. 29-32). In the process, he wrote or spoke to more than fifty other salesmen throughout the country, and he presented the salesmen's views to Kenneth Tooman, the executive vice-president for marketing (Pet. App. 30-32, 45).

During this activity, Branch Manager Meyers warned Hill: "David, you better cool it * * *. You may be being set up to be fired." When Hill asked why, Meyers replied, "Just cool it." (Pet. App. 30; A. 128a.)

The salesmen were unsuccessful in obtaining the desired sales incentive plan in the new agreement. In March 1975, the Company submitted the new contract, which was retroactive to January 1, to the salesmen for signature (Pet. App. 32). In April, Hill became the last salesman in his region to sign the new contract (Pet. App. 33).

Thereafter, Hill continued his efforts to secure an incentive plan for the salesmen. On April 18, Hill wrote Executive Vice-President Tooman, asking what had been decided with respect to the various incentive plans submitted by the salesmen's regional representatives and requesting that Tooman arrange a conference among the regional representatives to discuss their proposals. (Pet. App. 33; A. 78a, 79a.) During

[2] Each region selected a representative to deal with the Company on the proposed contract (Pet. App. 30).

the next week, Hill and other salesmen, including several regional representatives, talked about going to the annual meeting of Signal Corporation, the Company's parent, on April 29, since its shareholders were scheduled to vote on an incentive or bonus plan. On April 25, Hill telephoned Tooman's office to ascertain whether the vote would have any impact on Mack truck salesmen; he was informed it would not (Pet. App. 33; A. 162a-164a).

Hill was reprimanded by Regional Vice-President Bernard Platt for calling the Company's headquarters. Despite Hill's explanation that Tooman had asked the regional representatives to send their proposals directly to him, Platt admonished, "Well, we'll have no more phone calls." (Pet. App. 33-34; A. 164a-165a.) Hill continued his efforts to secure an incentive plan through September, 1975 (Pet. App. 46-47; A. 214a-217a).

On October 27, 1975, Hill placed a telephone call to H.J. Nave, chairman of the board and president of the Company. Nave was unavailable so Hill left his name and phone number and said he was with the O'Hare Branch. He did not explain why he was calling Nave. (Pet. App. 34; A. 169a.)

When Nave received Hill's message, he asked Tooman to find out what Hill wanted (A. 411a, 246a-247a, 250a). Tooman called Vice-President Davis who telephoned Regional Vice-President Platt (A. 411a, 246a-247a, 250a-251a, 98a-99a). Platt did not know why Hill had telephoned Nave (A. 411a, 260a, 99a).

However, during the conversation, Davis told Platt, "I don't know why we continue with this man. His performance is not good. It's not acceptable. We have this situation here. I don't know why we continue with this man." Davis assured Platt that Platt had the authority to fire Hill. (Pet. App. 41-42; A. 411a, 260a, 98a-99a.)

Following his conversation with Davis, Platt instructed District Manager King to fire Hill. On October 28, King wrote Hill a letter, which Hill received on October 30, stating that Hill's employment "is cancelled * * * effective ten (10) days from date of this letter" (Pet. App. 35; A. 80a, 172a-173a, 302a-303a).

Thereafter, Hill attempted to learn the reason for his discharge by writing to district manager King, who did not reply to his inquiries (Pet. App. 36; A. 81a, 329a). Hill also questioned Meyers as to the reason for his termination. In response to Hill's inquiry, "[W]hat excuse are you going to use?"; Meyers responded, "Well, they may try poor performance." (Pet. App. 35; A. 180a-181a.) Hill continued working at his job, contacting customers and drawing a salary, until November 6 (Pet. App. 49; A. 415, 82a, 84a, 103a, 182a).

B. The Board's Decision

The Administrative Law Judge, whose decision was adopted by the Board (Pet. App. 23-24), found that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by discharging Hill because it believed that his call to Nave was part of his effort to obtain different terms in the salesmen's contract,

which was concerted activity protected by Section 7, 29 U.S.C. 157 (Pet. App. 46-48, 52). The Law Judge rejected the Company's assertion that Hill was discharged for poor work performance (Pet. App. 36). The Law Judge noted that Hill had consistently been one of the Company's top salesmen, and that economic factors in 1975 affected not only Hill's performance that year, but the performance of the O'Hare branch as a whole (Pet. App. 37-39). The Law Judge also noted that Hill was given no serious warning that his performance was jeopardizing his job (Pet. App. 39-41).

The Law Judge rejected the Company's argument that the complaint was barred by the six-month limitation of Section 10(b) of the Act, 29 U.S.C. 160(b) (Pet. App. 48-51). The charge was filed on May 5, 1976, more than six months after Hill received the notice of discharge, but within six months of his actual termination on November 6. The Law Judge concluded that there were two independent violations of Section 8(a)(1); the "first occurred when Hill was initially given notice of his unlawful termination," and the second "occurred on the date [of his] discharge," for "it was still within Respondent's province to revoke its action and to return Hill's employment to its *status quo* at any point during the period between the notice and the effective date of discharge." (Pet. App. 49-50.)

The Board ordered, *inter alia*, that Hill be reinstated to his former position (Pet. App. 53, 24). The court of appeals enforced the Board's order by judgment order, without oral argument (Pet. App. 21-22).

ARGUMENT

1. Petitioner contends that any unfair labor practice occurred when Hill received written notification of his impending discharge on October 30, and that therefore his charge, filed on May 5, 1976, was time-barred by Section 10(b) of the Act. The Board found, however, that Hill's actual discharge on November 6 constituted an independent unfair labor practice and that the May 5 charge regarding that discharge was therefore timely.

Contrary to petitioner's contention (Pet. 10-12), the Board's position is fully consistent with *Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411. There, the only act within the Section 10(b) period was the enforcement of a union security agreement, valid on its face. This activity, by itself, was benign and could be impeached only by resorting to an event outside the limitations period (*i.e.*, showing that the union lacked majority status when it entered into the agreement). The Court therefore held that the complaint was barred by Section 10(b). Here, in contrast, Hill's discharge was unlawful without reference to the illegality of the prior notification. In such circumstances, the courts have uniformly held that Section 10(b) is no bar to consideration of independent violations occurring within the limitations period.[3]

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[3] See, *e.g.*, *National Labor Relations Board* v. *Plumbers & Pipefitters Local 214*, 298 F. 2d 427, 428 (C.A. 7); *General Motors Acceptance Corp.* v. *National Labor Relations Board*,

2. Petitioner's second contention (Pet. 12-13) that, in any event, Hill was not engaged in concerted activity at the time of his discharge merely takes issue with the Board's contrary evidentiary findings. Thus, while petitioner concedes that Hill was engaged in concerted activity prior to April when he signed the new contract, it claims that his activity thereafter amounted only to individual "gripes" and "grouses" (Pet. 13). The Board's contrary finding is amply supported by the record (Pet. App. 33-34, 47), and raises no issue warranting review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

Petitioner also contends that the Board improperly precluded it from discharging Hill for making an unauthorized call to Company headquarters—an action which the Company asserts was unprotected activity (Pet. 13-16). However, the Board did not find that the Company discharged Hill for making an unauthorized phone call. Indeed, the Law Judge expressly found that the Company's assertion in that regard was an "afterthought," noting that the Company's defense was based on its argument that Hill was discharged for poor performance (Pet. App. 47 n. 11). Rather, the Board found that the Company

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476 F. 2d 850, 853-854 (C.A. 1); *New York District Council No. 9, International Brotherhood of Painters* v. *National Labor Relations Board*, 453 F. 2d 783, 786 (C.A. 2), certiorari denied, 405 U.S. 988, 408 U.S. 930; and see *California School of Professional Psychology*, 227 NLRB 1657, 1665-1666, application for enforcement pending, C.A. 9, No. 77-2162.

terminated Hill because it considered the phone call evidence of Hill's continuing activity to obtain a contract modification. This case, therefore, does not concern the propriety of a discharge for disobeying established Company policy.

Petitioner also objects to the Law Judge's credibility resolutions (Pet. 17-18), and contends that the Board's conclusions were improperly based on inferences (Pet. 18-19). These contentions raise no issue warranting review by this Court. In any event, the Law Judge did not, as petitioner contends, uniformly credit Hill (see Pet. App. 34 n. 4, 39-40, 40 n. 10), and his credibility resolutions were carefully explained (see Pet. App. 41-45). It plainly cannot be said, on this record, that the General Counsel's evidence " 'carries its own death wound' " and that the Company's evidence " 'carries its own irrefutable truth.' " "There is therefore no basis for overturning the Law Judge's credibility resolutions." *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 659-660. Moreover, it is well settled that "the trier of fact may infer motive from the total circumstances proved." *Shattuck Denn Mining Corp.* v. *National Labor Relations Board*, 362 F.2d 466, 470 (C.A. 9).

Petitioner's contention that the court of appeals improperly enforced the Board's order without oral argument or full written opinion pursuant to Third Circuit Rule 12(b) is insubstantial. See *Taylor* v. *McKeithen*, 407 U.S. 191, 194-195 n. 4; *United States* v. *Baynes*, 548 F.2d 481 (C.A. 3); *National*

Labor Relations Board v. *Amalgamated Clothing Workers of America, AFL-CIO, Local 990*, 430 F.2d 966 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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